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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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DANIEL RIVERA,

Plaintiff,

v.

16 Civ. 7552 (JGK) (OTW)

HOME DEPOT U.S.A., INC.,

Defendant.

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HOME DEPOT U.S.A., INC.,

Third-Party Plaintiff,

v.

BRYAN'S HOME IMPROVEMENT
CORP.,

Third-Party Defendant.

Status Conference

(Via Teleconference)

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November 10, 2020
11:20 a.m.

Before:

HON. ONA T. WANG,

Magistrate Judge

APPEARANCES

BONDURANT, MIXSON & ELMORE

Attorneys for Defendant/Third-Party Plaintiff

BY: RONAN P. DOHERTY, ESQ.

JEFFREY W. CHEN, ESQ.

HERZFELD & RUBIN, P.C.

Attorneys for Third-Party Defendant

BY: HOWARD S. EDINBURGH, ESQ.

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(Case called)

THE DEPUTY CLERK: Please state your names for the court reporter.

MR. DOHERTY: For Home Depot, USA, Ronan Doherty -- that's R-O-N-A-N, D-O-H-E-R-T-Y -- and Jeffrey Chen, C-H-E-N.

MR. EDINBURGH: Yes. For third-party defendant Bryan's Home Improvement, this is Howard Edinburgh -- and my last name is spelled like the city in Scotland, E-D-I-N-B-U-R-G-H -- of Herzfeld & Rubin.

THE COURT: All right. Good morning, everyone. I apologize that my previous conference went a little over. One of the attorneys was late to the proceeding, which, had we started that last one on time, this one would have started on time also. But I do appreciate that you did all call in on time.

We are here for a status conference in this case. We are proceeding by telephone due to the COVID-19 pandemic. This is a public line and should be treated like my virtual courtroom. I expect the same decorum on the line that I expect in my courtroom. I also expect that members of the press or public may be on the line on a listen only basis.

We do have a court reporter for this conference, and at the end of the conference, I think I'm going to ask that the parties order a copy of the transcript and share the cost. It does not need to be a daily transcript or on any super

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1 short-term basis.

2 Recording or rebroadcasting by anyone else on this
3 line is strictly prohibited.

4 And for the purposes of having a clear transcript,
5 please stay on mute when you're not talking. I will do the
6 same. Say your name when you start speaking, and please don't
7 interrupt each other. I will try to do that as well, although
8 I do reserve the right to interrupt from time to time.

9 But I had a few questions, I guess, and it's been a
10 while since I've seen you all. So the briefing that I see is
11 on common law indemnity only, and I was wondering where
12 contractual indemnity fits in, if at all. And I'd like to hear
13 from Home Depot first. And particularly, I mean, when I was
14 reading the papers, I was not clear whether Home Depot's
15 position was that contractual indemnification also governs the
16 rest of this action and you're really only fighting about
17 common law indemnification or what. It's been a while, so
18 please refresh my recollection.

19 MR. DOHERTY: Sure. Okay, your Honor. This is Ronan
20 Doherty on behalf of Home Depot. And I will tell you that as I
21 reread these briefs, you know, to get ready for today's
22 conference, I can appreciate your confusion, and so hopefully
23 we'll be able to work through that today.

24 The briefs before the Court are about Home Depot's
25 request for fees, and we have asked for two different sets of

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1 fees. The Phase I fees are those required to defend Home Depot
2 against Mr. Rivera's claim, and for those fees, the only basis
3 on which Home Depot has requested those fees is on common law
4 indemnity. And so there is no claim whatsoever under the
5 contract for the Phase I fees.

6 And then the second phase of fees are for pursuing
7 Home Depot's claims against Bryan's for its duty to defend and
8 its duty to indemnify Home Depot. Those are contract claims
9 under the service provider agreement. That's what the Phase II
10 claims are about. And so those are only under the contract.

11 And so there are -- as presented to you in these
12 briefs, there are two separate claims for fees under those two
13 different grounds, but maybe, if I can, I think it would be
14 helpful to let the Court know why this matters, because an
15 awful lot has happened since Home Depot filed its motion for
16 fees, I think in October of last year. What we have since
17 discovered through postjudgment discovery is that Bryan's, the
18 third-party defendant, is essentially judgment proof.

19 So Home Depot lost a judgment to Mr. Rivera in the
20 neighborhood of \$9 million. Home Depot has satisfied that
21 judgment. Home Depot has a corresponding judgment in the exact
22 same amount against Bryan's, but postjudgment discovery
23 suggests that Bryan's does not have the assets to cover that
24 judgment. The only available source of recovery at this point,
25 based on the available information, is an insurance policy

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1 provided by the New York State Insurance Fund. And the
2 policy -- the fund's position is that the policy only covers
3 common law indemnity and it excludes contractual indemnity. So
4 as a practical matter, based on what we know today, the only
5 claim that really matters on fees, the only one that is
6 practically important is the Phase I claim for common law
7 indemnity, and that's what Home Depot continues to press and
8 continues to want to have awarded here.

9 The other thing that has happened beyond -- in our
10 discovery about Bryan's available assets is that Bryan's,
11 throughout the course of the papers that we filed in front of
12 your Honor, said that it would not demand that the fund pay the
13 judgment because the owner of Bryan's believed that Mr. Rivera
14 was faking. So now that ship has obviously sailed. Mr. Rivera
15 had his day in court and won, and Home Depot has satisfied his
16 judgment. In the course of the subsequent proceedings, Home
17 Depot and Bryan's entered into an agreement where Bryan's
18 assigned its claim for coverage to Home Depot, and Home Depot
19 has now filed a claim against the New York State Insurance Fund
20 in the New York Court of Common Claims seeking coverage. And
21 so what remains of this case is the fee dispute, and under
22 certain circumstances it could come back here if Bryan's
23 basically breaches its assignment or the assignment is
24 defeated, but what's practically going on here is that common
25 law indemnity is critical because that's the most likely source

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1 of recovery and that's why the parties, I think, you know, have
2 spent so much time on this in their briefing, and why it may
3 occur to the Court, well, why are we bothering if there's
4 contractual indemnity, why can't we just say that, and what
5 Home Depot needs the Court to understand is that it actually
6 does make a very big difference because without common law
7 indemnity, the chances that Home Depot will recover those fees
8 are very low.

9 Now Judge Forrest entered summary judgment in Home
10 Depot's favor on common law and contractual indemnity. That's
11 the ruling that was appealed to the Second Circuit, and the
12 Second Circuit affirmed the contract claim but did not reach
13 the common law indemnity theory. And so as a result, the
14 parties have been in dispute about what the effect of that
15 ruling is. We have cited -- you'll see in our reply briefs --
16 the cases that show that as between the parties, Judge
17 Forrest's summary judgment ruling, having been undisturbed,
18 remains law of the case here and so all that's required for
19 Home Depot to recover its Phase I fees under common law
20 indemnity is for the application of the law of the case rule.
21 I don't think that there's much of a dispute about amounts or
22 the amount of the fees on that, but if I'm wrong, I'm sure
23 Bryan's will let us know.

24 But I think that's Home Depot's answer to your
25 question. I hope that it is an answer. But if it's not,

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1 please let me know and I will do my best to answer the Court's
2 question.

3 THE COURT: Okay. Thank you, Mr. Doherty. That was
4 really clear.

5 Now is the point where we veer into the area where the
6 litigants end up wondering why the judge is asking whacky
7 questions, and this is purely for my own understanding. So the
8 New York State Insurance Fund has already stated that the only
9 indemnifications that it will -- follow may be the wrong
10 word -- is common law and not contractual indemnity; is that
11 right?

12 MR. EDINBURGH: May I respond, your Honor?

13 THE COURT: No, no. This is a question for
14 Mr. Doherty.

15 MR. EDINBURGH: Okay. Okay.

16 MR. DOHERTY: So -- and I don't think that there's
17 much disagreement on this, your Honor, but yes, the New York
18 State Insurance Fund has said that there is no coverage for
19 contractual indemnity for Bryan's. I believe -- and this is
20 outside the record of what's happened in your court, your
21 Honor, but New York State Insurance Fund has denied any
22 liability under the policy, which is why we have litigation in
23 the New York Court of Claims.

24 THE COURT: Okay. And then so Section 10 of the FPA
25 doesn't apply or is it that -- because I remember Bryan's had

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1 its own insurance, but I guess that insurance has been
2 exhausted so you're now seeking the balance of it? Or did
3 something else happen? I'm just trying to understand how we
4 get to where we are today.

5 MR. DOHERTY: Right. So we have a series of messes is
6 that get us to where we are today, your Honor. And Bryan's
7 agreed to have CGL, corporate general liability insurance, as
8 part of its agreement with Home Depot, and it obtained it, but
9 the coverage that it obtained there specifically excludes
10 liability for injuries to employees. And so there's no
11 coverage there for this case. The workers' comp employer's
12 liability policy that they obtained from the fund does include
13 common law indemnity, you know, subject to the New York
14 Workers -- the WCL Section 11 on a showing of grave injury, and
15 so if there's liability on that theory -- and as I said before,
16 we think Judge Forrest has already determined that -- then I
17 believe -- and Mr. Edinburgh can answer his view of this, but
18 then I think that there's coverage and not much dispute about
19 it and it would be covered. And so that is why a ruling on the
20 contractual liability, even if Home Depot could recover all of
21 the fees at issue on this motion under the contract -- and
22 that's obviously disputed by Bryan's, but even if they could,
23 that would in practice make very little difference to the
24 parties because the only coverage that's available that we know
25 about, the only assets that are available that we know about,

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1 are this coverage for common law indemnity under the fund
2 policy.

3 THE COURT: Okay. Thank you. That was a great
4 explanation.

5 So then I guess my next question is: If Bryan's has
6 assigned its claims under the workers' comp liability, why is
7 Mr. Edinburgh here fighting all of this? Why are you not just
8 going forward in the court of claims?

9 MR. EDINBURGH: May I respond?

10 THE COURT: Yes. Now you can speak, Mr. Edinburgh.
11 Thanks.

12 MR. EDINBURGH: Thank you, your Honor.

13 Can I go back to what was previously said before I
14 answer this specific question or do you want me to just answer
15 this specific question?

16 THE COURT: Sure. Go ahead. Now we're in the realm
17 of just satisfying the judge's curiosity so I understand the
18 big picture of where we are.

19 MR. EDINBURGH: Okay. I'd like to give you the larger
20 context because there have been material and substantial events
21 that did occur, as counsel for Home Depot mentioned, subsequent
22 to the submission of the motion. And although I don't think
23 they necessarily affect the outcome of what is before your
24 Honor in terms of the actual controversy, it does give you a
25 holistic view of this litigation post judgment.

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1 I think Home Depot really always knew they had a
2 mom-and-pop subcontractor, which it had no assets of its own.
3 The commercial general liability policy, which would otherwise
4 have covered contractual liability, as indicated, had an
5 employee exclusion clause. Plus in any event, it was only a
6 million dollars per occurrence policy. So that the \$9 million
7 judgment, in essence, it would have covered at most a million,
8 but it didn't even cover that because it disclaimed under that
9 exclusion, which is universally enforced, unfortunately, in New
10 York courts. So that left no coverage for contractual
11 indemnity for the underlying action, the Rivera action.

12 The state fund has employer's liability coverage,
13 which is an element of the coverage that's part of the workers'
14 comp coverage, but it's a separate employer's liability
15 coverage for third-party actions against the employer. And
16 that's the coverage under which Bryan's was defended in the
17 underlying Rivera action. That coverage, by operation of law,
18 by statute, is prohibited from covering contractual indemnity.
19 It's not a question of the language of the policy. The New
20 York State Insurance Fund is a state agency. That's why
21 they're in the court of claims now. And it only covers
22 employer's liability. So the contractual aspect of this is
23 something that was never covered and cannot be covered as a
24 matter of New York law. That's what it is.

25 So because of the Second Circuit's decision, and the

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1 way the Second Circuit framed its decision -- and again, this
2 is a dispute that's going to be resolved in the court of
3 claims. It's really unnecessary for the attorney fee issue,
4 but I think it's worthy of discussion because it looms over
5 this whole proceeding like a dark cloud almost. The court had
6 before it two ways to affirm what happened below, or reverse.
7 And both the contractual and common law claims and the lower
8 court's or Judge Forrest's rulings and everything else was
9 briefed to the full extent by both parties. And the court
10 acknowledged that, but yet it decided only to affirm the
11 judgment on contractual. It specifically said that even though
12 common law was before it, it was not addressing that because
13 there was no need to address it because it already affirmed the
14 judgment. Now the effect of that is highly contentious.

15 THE COURT: Right. Okay. Mr. Edinburgh, I'm going to
16 interrupt you right now. Like I said, I reserve the right to
17 interrupt.

18 My question was: If Bryan's has assigned the claim --
19 I understand your arguments about the implications of the
20 Second Circuit on common law indemnity. I understand that.
21 That's in your brief. That's been briefed. What I want to
22 know is, since Bryan's assigned its claim to Home Depot --

23 MR. EDINBURGH: Right.

24 THE COURT: -- like what is the dispute now? If
25 Bryan's assigned its claim to Home Depot, why are we arguing

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1 here?

2 MR. EDINBURGH: Because in essence, the judgment
3 against Bryan's is still subject to some modification to add in
4 the attorney's fees cost, which is an open issue. And that is
5 a dispute not against the state insurance fund; that's a
6 dispute against Bryan's. Ultimately, whatever the Court awards
7 or doesn't award --

8 THE COURT: Right. But that's contractual indemnity,
9 right? So I'm trying to understand where or why there's an
10 argument about --

11 MR. EDINBURGH: Because Bryan's --

12 THE COURT: Wait, wait, wait. I'm the only one
13 allowed to interrupt right now.

14 MR. EDINBURGH: Sorry. I apologize.

15 THE COURT: I have to get my question out; otherwise
16 you can't answer it, then you're not answering my question,
17 right? You're saying something else.

18 Okay. I understand why there is the argument about
19 contractual indemnity because the judgment might need to be
20 modified, although, I mean, that one seems to be more clearly
21 law of the case with the Second Circuit decision, but then in
22 terms of the part that involves the New York State Insurance
23 Fund and common law indemnity, why is Bryan's arguing about
24 that if Bryan's has already assigned that claim to Home Depot?

25 MR. EDINBURGH: Yes. Because the claim that's

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1 assigned is a claim between -- is a claim -- and both attorneys
2 here are the attorneys that drafted that assignment. The
3 assignment is whatever the ultimate judgment happens to be.
4 That judgment will not be enforced against Bryan's. What it is
5 was any rights that Bryan's has to be indemnified by the State
6 Insurance Fund for that judgment is being assigned. And that
7 allowed Home Depot to go into the court of claims. But the
8 State Insurance Fund still has an obligation to defend Bryan's
9 in this court, against claims against it. They don't have a
10 duty to indemnify it because that will depend on ultimately
11 what happens in the court of claims, but they still have a duty
12 to defend Bryan's. And that duty means to defend it against
13 claims that it owes additional money in terms of attorney's
14 fees. That is a controversy that is between Home Depot and
15 Bryan's. It is not between Home Depot and the fund. It will
16 become an issue between Home Depot and the fund once --
17 whatever your Honor ultimately does, when we do have oral
18 argument, and the Court decides, then that judgment that will
19 be amended and that will become ultimately part of the
20 proceeding in the court of claims. So this is not an advisory
21 opinion. This is a controversy, and Bryan's has a right to
22 counsel to oppose the application for attorney's fees. So even
23 though there's an assignment of Bryan's right to be
24 indemnified, if any, from the fund, depending upon other
25 events, the duty to defend, it still exists, and so the fund,

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1 you know, has assigned lawyers, my firm, and Bryan's has every
2 right in the world now to continue to oppose the motion for the
3 reasons stated, or the reasons I'd like to articulate as to
4 what's going on. That's why this motion is still, you know, a
5 controversy between the parties is that we haven't forsaken
6 that right, and Bryan's isn't a strawman or not the party in
7 interest. It is the party in interest because right now,
8 they're asking for attorney's fees against Bryan's, and that is
9 not an assignable claim. What's assignable is to be
10 indemnified for what ultimately is the amount of that claim,
11 when it matures into a judgment.

12 I hope that answers your Honor's question.

13 THE COURT: Actually, it does. Thank you very much.

14 I'm just going to take a five-minute break, okay? You
15 can stay on the line. You can mute if you want.

16 MR. DOHERTY: Your Honor? Your Honor?

17 THE COURT: Yes, Mr. Doherty.

18 MR. DOHERTY: Could I just maybe chime in on that last
19 point very quickly?

20 THE COURT: Sure.

21 MR. DOHERTY: I understand the premise of the Court's
22 question to be, why is Bryan's fighting the common law
23 indemnity fee claim when, in all practical purposes, that is an
24 obligation that the fund would have to bear, and that's exactly
25 right. And the fact is that, you know, as Mr. Edinburgh has

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1 pointed out, the fund has controlled the defense of Bryan's
2 throughout the proceedings in this case, and the fund is the
3 one that will face the liability in the court of claims, and so
4 I think the practical answer to the question, in addition to
5 whatever theoretical duty to defend that may exist, is that the
6 fund would prefer not to pay it, and that this is as much about
7 the fund's liability as it is about Bryan's.

8 THE COURT: Okay. Thank you. That's essentially what
9 I took from what Mr. Edinburgh said too.

10 MR. DOHERTY: Okay.

11 THE COURT: Okay. I'm going to take a quick
12 five-minute break. I'm not issuing any rulings. I just need
13 to make some notes to myself, so I figured I would give you all
14 a break too. Five minutes, at least. You know, just keep your
15 line open but keep it on mute. You can do whatever you want to
16 do, okay? Five minutes.

17 MR. EDINBURGH: Thank you, your Honor.

18 MR. DOHERTY: Thank you.

19 THE COURT: Thank you.

20 (Recess)

21 THE COURT: All right. Thanks. I just needed to make
22 some notes myself. Obviously I'm not ruling on anything since
23 I have to issue an R&R anyway.

24 I was wondering, did anybody else have any other
25 issues or questions or anything they wanted to raise? Like I

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1 said, I'm not hearing oral argument. This really was just to
2 help answer my questions.

3 MR. EDINBURGH: I would like to speak, if I could,
4 your Honor. This is Howard Edinburgh.

5 THE COURT: Okay. Go ahead.

6 MR. EDINBURGH: Just to clarify, will there be oral
7 argument or you'll be deciding on submission after today?

8 THE COURT: There will not be oral argument.

9 MR. EDINBURGH: Okay. Fair enough.

10 THE COURT: I think your briefs were quite clear what
11 the issues were. I just wanted to make sure I wasn't missing
12 something. I mean, one of the things was understanding how
13 common law indemnity fits in, given the language, in light of
14 Judge Forrest's rulings on contractual and common law
15 indemnity, and now I understand the distinction in the
16 arguments on contractual indemnity for the indemnification
17 action and then also why Home Depot is seeking coverage under
18 common law indemnity only for the personal injury action. I
19 just wanted to make sure I wasn't missing anything, and counsel
20 on both sides, thank you for explaining it.

21 MR. EDINBURGH: Well, and I appreciate that, your
22 Honor, and I thank you, and I hope this doesn't sound like an
23 argument, but given what Mr. Doherty said in his opening
24 remarks in responding to your Honor's questions, my only
25 concern -- or not my only concern, but one of my concerns is

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1 that for purposes of deciding the motion, however your Honor
2 decides in evaluating these issues, we have stated that it's
3 our position that, you know, common law indemnity, Home Depot
4 could be considered as having had common law indemnity, but
5 nevertheless -- for purposes of this motion only. But that
6 being the case, under New York law, they're not entitled to
7 attorney's fees for seeking that indemnity, only for defending
8 the underlying action. And that's really, you know, the core
9 issue, as I see it, from my perspective, you know, of New York
10 law on that point. So all these other issues about the meaning
11 of the Second Circuit decision and how it affects now a
12 postjudgment issue, not a prejudgment issue, and how it affects
13 everything else, really, although it's intriguing and it's
14 going to be the subject in the state court system of a decision
15 and maybe even appeals, is really not an issue for what we're
16 doing here today. It may explain a lot of why people are
17 taking positions they're taking in the background, but legally,
18 it's really a question of the scope of what you're entitled to
19 under New York State law in terms of attorney's fees and common
20 law indemnity claims. And I think we've briefed that, the
21 other side has briefed that. So, you know, I think our
22 discussion today is illuminating for what's going on in the
23 real world of litigation with the coverage issues, but for the
24 attorney fee issues, you know -- it's juicy and it's really the
25 inside baseball kind of issue, but it's not really the issue

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1 that needs to be resolved before your Honor in this motion.

2 That's really my comment more than a question. But I thank you
3 for listening and hearing me out on this.

4 THE COURT: All right. Thank you.

5 Is there anything else from either side?

6 MR. DOHERTY: Just one last very quick response to
7 that for Home Depot, your Honor.

8 I think rather than the inside baseball, this is the
9 ballgame. The Phase I claim for fees under common law
10 indemnity is the practical dispute that's left between the
11 parties. And we appreciate your Honor's time today.

12 THE COURT: All right. Thank you very much. I also
13 appreciate your time and your patience for my going over with
14 my prior conference.

15 All right. Again, I'm going to request that the
16 parties order the transcript. You don't have to order it on
17 any expedited basis, but I will need the transcript before I
18 get the report and recommendation out. So order the
19 transcript, share the cost. Okay?

20 MR. DOHERTY: Thanks so much.

21 MR. EDINBURGH: Thank you, your Honor.

22 THE COURT: All right. Thank you very much. We are
23 adjourned.

24 o0o